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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. Injuries Arising out of and in the Course of Employment

A. *Close Proximity to Place of Employment*

Workmen's compensation laws eliminate negligence as the criterion for liability with respect to work-related injuries and instead determine liability by the relationship that the injury has to the employment. This relationship, described by the phrase "arising out of and in the course of employment," is the basis for liability.[1] The simplicity of this statement belies the difficulty of identifying its true scope, as evidenced by the three 1978 cases[2] in which the South Carolina Supreme Court was required to determine whether or not a particular injury fell within this meaning.

In *Skipper v. Southern Bell Telephone and Telegraph Co.*,[3] the claimant was held entitled to compensation for injuries suffered as the result of an assault by her supervisor. The claimant, Pherebie Skipper, was employed by Southern Bell as a long distance telephone operator. She was subjected to constant and unwarranted harassment by Gloria Thompson, a fellow employee who held a superior position. On the day of the injury, Skipper, who normally got off work at 11:00 p.m., was granted permission to leave early. As she was preparing to leave the building in which she worked, she was accosted by Thompson on a flight of stairs that led to the street. Thompson criticized Skipper's job performance and told her that "she would never get anywhere" in her job. Thompson concluded this tirade by slapping Skipper, which caused Skipper to fall down the stairs and suffer injury.[4]

Among the issues presented to the supreme court were: (1) did the assault arise out of Skipper's employment, and (2) did it occur in the course of her employment? The court answered both questions in the affirmative.[5]

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1. S.C. Code Ann. § 42-1-160 (1976). *See generally* S. Horovitz, Injury and Death Under Workmen's Compensation Laws 5 (1944).

2. McDaniel v. Bus Terminal Restaurant Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978); Skipper v. Southern Bell Tel. and Tel. Co., 271 S.C. 152, 246 S.E.2d 94 (1978); Gregg v. Dorchester County School Sys., 270 S.C. 189, 241 S.E.2d 554 (1978).

3. 271 S.C. 152, 246 S.E.2d 94 (1978).

4. *Id.* at 154-55, 246 S.E.2d at 95.

5. On these two issues it has been said: "The two elements must co-exist. They must be concurrent and simultaneous. One without the other will not sustain an award; yet the

On the first issue, the court stated: "Accidents [arise] out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work."[6] In finding that the injuries arose out of the employment, the court emphasized that this requirement refers to the origin of the cause of the accident.

While the "arising out of" requirement is imposed to ensure that a causal connection exists between the injury suffered and the employment, the "in the course of" requirement is imposed to ensure that a temporal and spatial relationship exists as well.[7] Ostensibly, this means that the injury must occur during working hours and at the place of employment in order to be compensable. In *Skipper,* the court concluded that the injury did occur in the course of Skipper's employment, even though the accident took place after she had ceased working for the day and occurred outside the room in which she worked. The court noted:

> The rule often recognized in workmen's compensation cases is that an employee, to be entitled to compensation, need not be in the actual performance of the duties for which he was expressly employed in order, for his injury or death to be in the "course of employment", and thus compensable. It is sufficient if the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which *in some logical manner pertains to or is incidental to his employment.*[8]

Thus, a cessation from work does not immediately terminate compensation coverage.[9] Indeed, it would be unnecessarily strict if employees were not protected for a reasonable period of time before and after working hours, and also for a reasonable distance to and from the place of employment. After all, "[t]he employment contemplated [the employee's] entry upon and departure

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two are so entwined that they are usually considered together in the reported cases; and a discussion of one of them invokes the other." Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 429, 32 S.E.2d 240, 242 (1944).

6. 271 S.C. at 157, 246 S.E.2d at 96 (quoting 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.00 (1976)).

7. "[T]he words 'in the course of employment,' have reference to the time, place and circumstances under which the accident occurs." Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 429, 32 S.E.2d 240, 242 (1944). *See also* S. HOROVITZ, *supra* note 1, at 154-73.

8. 271 S.C. at 156, 246 S.E.2d at 96 (emphasis added) (quoting Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973)).

9. *See id.*

from the premises as much as it contemplated his working there, and must include a reasonable interval of time for that purpose."[10]

This practice of allowing coverage for reasonable extensions of the time and place of employment is in accordance with the workmen's compensation system's objective of providing broadened coverage for work-related injuries[11] and the South Carolina Supreme Court's policy of construing the Workmen's Compensation Act[12] liberally to give effect to its remedial purposes.[13] In the past, as in *Skipper,* the court resolved statutory ambiguity in favor of the claimant.[14]

B. The Special Errand Doctrine

As a general rule, an employee who is going to or coming from the place of his employment is not discharging any service growing out of or incidental to his employment. Therefore, an injury suffered by the employee while traveling to or from work is not considered to arise out of and in the course of his employment.[15] To alleviate the harshness of this "going and coming" rule, the South Carolina courts have long recognized several exceptions.[16]

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10. Cudhay Packing Co. v. Parramore, 263 U.S. 418, 426 (1923) (citations omitted).

11. *See* 81 AM. JUR. 2d *Workmen's Compensation* § 2 (1976).

12. S.C. CODE ANN. §§ 42-1-10 to -19-40 (1976 & Cum. Supp. 1978).

13. *E.g.,* Moore v. Family Serv. of Charleston County, 269 S.C. 275, 237 S.E.2d 84 (1977); Carter v. Penny Tire and Recapping Co., 261 S.C. 341, 200 S.E.2d 64 (1973); Flemon v. Dickert-Keowee, Inc., 259 S.C. 99, 190 S.E.2d 751 (1972); Alewine v. Tobin Quarries, Inc., 206 S.C. 103, 33 S.E.2d 81 (1945); Simpkins v. Lumbermens Mut. Cas. Co., 200 S.C. 228, 20 S.E.2d 733 (1942). *Cf.* Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960) (cannot construe the Act beyond the legislature's intent); Price v. B.F. Shaw Co., 224 S.C. 89, 77 S.E.2d 491 (1953) (the Act should not be construed so as to make it a form of insurance); Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952) (should not construe the Act so as to do violence to one of its specific requirements).

14. *E.g.,* Baldwin v. Pepsi-Cola Bottling Co., 234 S.C. 320, 108 S.E.2d 409 (1959); Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

15. *E.g.,* Daniels v. Roumillat, 264 S.C. 497, 501, 216 S.E.2d 174, 176 (1975).

16. *See, e.g.,* Gallman v. Spring Mills, 201 S.C. 257, 22 S.E.2d 715 (1942).

> [W]e [have] recognized the following exceptions to the [going and coming] rule: (1) Where, in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) where the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment.
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> . . . [A] third exception to the general rule . . . is . . . "[w]here the way used is the sole and exclusive way of ingress and egress, or where the way of ingress or egress is constructed and maintained by the employer." And the qualification was added to it that an injury would not be compensable unless there be some inherent danger in the use of such exclusive street or way.

One exception adopted by the South Carolina Supreme Court is known as the "special errand doctrine."[17] Justice Gregory has noted:

> The underlying basis of the "special errand" doctrine is that the general rule excluding injuries incurred during the trip to or from work should not apply if the journey to or from work was part of the special errand or mission for the employer or if the journey itself was a substantial part of the service for which the worker was employed.[18]

This doctrine can be easily stated, but perhaps because of its novelty in South Carolina law, confusion remains regarding how it is to be applied. Two cases involving this doctrine were decided by the supreme court in 1978.[19]

In *Gregg v. Dorchester County School System,*[20] the special errand doctrine was found inapplicable and compensation benefits were denied. The claimant, Gregg, was an assistant principal at a high school; his work day normally ended at 6:00 p.m. His employment required, however, that, when requested, he attend and help maintain order at the high school's football games, which were held at night. As Gregg was driving home from one such game, he was injured in an automobile accident when a horse darted onto the highway. The court applied the going and coming rule and determined that the injury did not arise out of and in the course of his employment since the accident occurred while Gregg was on his way home from work and away from the premises of his employment. Furthermore, the special errand exception was held inapplicable essentially because there was nothing "special" about the plaintiff's trip from the football game to his home. The court emphasized that attendance at football games was a "normal" aspect of Gregg's duties as assistant principal,[21] and that he was injured during his "normal" trip home

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Eargle v. South Carolina Elec. and Gas Co., 205 S.C. 423, 431, 32 S.E.2d 240, 243 (1944) (citing and quoting in part Gallman v. Spring Mills, 201 S.C. 257, 22 S.E.2d 715 (1942)).

17. Bickley v. South Carolina Elec. and Gas Co., 259 S.C. 463, 192 S.E.2d 866 (1972).

18. McDaniel v. Bus Terminal Restaurant Mgmt. Corp., 271 S.C. 299-302, 247 S.E.2d 321, 322 (1978) (citing Gregg v. Dorchester County School Sys., 270 S.C. 189, 192, 241 S.E.2d 554, 555 (1978)).

19. McDaniel v. Bus Terminal Restaurant Mgmt. Corp., 271 S.C. 299, 247 S.E.2d 321 (1978); Gregg v. Dorchester County School Sys., 270 S.C. 189, 241 S.E.2d 554 (1978).

20. 270 S.C. 189, 241 S.E.2d 554 (1978).

21. *Id.* at 193, 241 S.E.2d at 556.

after the completion of the duties of his job.[22] Moreover, in making the trip he was not performing any service for his employer.[23]

Similarly, in *McDaniel v. Bus Terminal Restaurant Management Corp.*,[24] the going and coming rule overshadowed the special errand doctrine and the claimant's injuries were deemed not to have arisen out of and in the course of her employment. The claimant, McDaniel, was employed at a restaurant as a cook. A mandatory meeting of all restaurant employees was scheduled to discuss work procedures and customer service. McDaniel was not scheduled to work on the day of the meeting but she made a special trip to attend. The meeting lasted less than an hour and all employees were paid for their attendance. On the return trip home McDaniel was injured in an automobile accident. In denying her workmen's compensation benefits, the court stated:

> Ms. McDaniel was notified of the November 5 meeting in advance. She was not called out by her employer to perform an emergency service. She performed no service to her employer while enroute to or from her place of employment and the trip itself was not a substantial part of the service for which she was employed. Meetings of this type had been held in the past and were not unusual or "special." Attendance at these meetings was a normal, customary aspect of Ms. McDaniel's job and she did not perform a special errand by attending the meeting . . . .[25]

Moreover, the court noted that the meeting was held at the normal place of employment and that McDaniel had traveled to and from the meeting by her normal mode of transportation. As in *Gregg*, the court in *McDaniel* placed emphasis on the normalcy of the function attended and the trip made.

Gregg and *McDaniel* suggest that the South Carolina Supreme Court, in considering the applicability of the special errand doctrine as an exception to the going and coming rule, will require not only that the employee be injured while performing an "errand," that is, either performing a service for the employer while enroute to or from the place of employment, or making a trip that is a substantial part of the service for which he was employed; but also, the court will require that this errand be

22. *Id.* 241 S.E.2d at 555.
23. *Id.*
24. 271 S.C. 299, 247 S.E.2d 321 (1978).
25. *Id.* at 303, 247 S.E.2d at 323.

"special." Although the court provided no precise definition of "special" in this context, it appears that a meeting or function is not special if: (1) the employee is given advance notice of the function and his required attendance; (2) such functions are not unusual and have been held in the past; (3) attendance at the function is a normal, customary aspect of the employee's job; and (4) the function was not called as the result of an emergency situation.

II. EXCLUSIVE REMEDY

A. *Loss of Consortium*

In *Lowery v. Wade Hampton Co.*,[26] the South Carolina Supreme Court held that the exclusive remedy provision of the state's workmen's compensation laws[27] barred a husband's independent cause of action for loss of consortium against his wife's employer. In so holding, the court may have strained logic and the normal rules of statutory construction, but the result reached is clearly just and within the traditional policies of the workmen's compensation system.

On its face, the exclusive remedy provision of the South Carolina Workmen's Compensation Act does not expressly bar a spouse from bringing a loss of consortium action against the injured spouse's employer. The Act merely states that the acceptance of compensation benefits by the injured employee "shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin," as against the employer.[28] Therefore, if this provision is to bar loss of consortium suits, a spouse must fall within the definition of either "next of kin" or "dependent."

The present South Carolina Code of Laws does not define "next of kin,"[29] but this phrase usually encompasses only those

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26. 270 S.C. 194, 241 S.E.2d 556 (1978).

27. S.C. CODE ANN. § 42-1-540 (1976).

28. *Id.* Section 42-1-540 provides in relevant part:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

29. The original Act defined "next of kin," or persons to receive benefits in the event of no dependents, as "father, mother, widow, child, brother, and sister." 1936 S.C. Acts

who are blood relatives.[30] Given this interpretation of the phrase as exclusory of a spouse, the expression as used in the exclusive remedy section does not include spouses or preclude loss of consortium suits. Whether or not a spouse is a "dependent" is a factual determination,[31] unless the employee died as a result of his injuries, in which case the surviving spouse is conclusively presumed to be a dependent.[32] Based on this argument, the husband in *Lowery* contended that since "spouse" was not specifically listed or included in these definitions, a spouse's independent cause of action for loss of consortium was outside the scope of the exclusive remedy provision.

The court simply refused to accept this strict interpretation of the statute, noting:

> [T]he cases with near unanimity have barred suits by husbands for loss of consortium . . . . The principal justification for all these decisions usually lies in the explicit wording of the clause barring any noncompensation liability for damages on account of the injury or death. Even without the additional precaution of a list of third persons barred, the sweeping language used in describing the employer's immunity seems to indicate a legislative intention that is accurately reflected in the majority rule.[33]

In reaching its decision that loss of consortium suits are not allowable under the South Carolina workmen's compensation system, the court placed emphasis on two factors: (1) the majority rule bars these suits; and (2) the legislature's use of broad language in describing the employer's immunity indicates that spouses come within its terms.

The overwhelming weight of authority from other jurisdictions is against allowing loss of consortium suits when the injured spouse has accepted compensation coverage.[34] Unlike South Car-

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1231, 1252. In 1972 the Second Injury Fund was created and all mention and definition of "next of kin" was deleted from the section. S.C. CODE ANN. § 72-165 (1962 & Cum. Supp. 1975) (current version at *id.* § 42-9-140 (1976)).

30. *See* Annot., 32 A.L.R.2d 296 (1953).

31. *See* S.C. CODE ANN. § 42-9-120 (1976).

32. *Id.* § 42-9-110.

33. 270 S.C. at 198, 241 S.E.2d at 558 (quoting 2 A. LARSON, *supra* note 6, § 66.20 (1976)).

34. *See, e.g.*, England v. Dana Corp., 428 F.2d 385 (7th Cir. 1970) (Indiana law); Lunow v. Fairchance Lumber Co., 389 F.2d 212 (10th Cir. 1968) (Oklahoma law); Posegate v. United States, 288 F.2d 11 (9th Cir.) *cert. denied*, 368 U.S. 832 (1961) (Federal Em-

olina, however, many other states have statutory exclusive remedy provisions that expressly include spouses.[35] Additionally, some foreign courts, in barring the action, have described the loss of consortium action as being derivative[36] or dependent.[37] In South Carolina, however, this action has been described as being independent.[38] This difference in characterization of the loss of consortium action[39] could mean that the reasoning of other courts would not apply in this state. Some courts, however, have maintained that the independent nature of the cause of action should make no difference.[40]

The court in *Lowery* attached great significance to the broad language of the statute in concluding that spouses were meant to be included within the prohibitions of the statute's exclusive remedy provision.[41] This approach ignores the rule of statutory construction *expressio unius est exclusio alterius,*[42] which provides the assumption that a statute means exactly what it says and no more. Arguably, if the General Assembly had meant to include spouses in the list of those excluded from bringing an action against an employer, then it would have listed spouses along with next of kin and dependents. By negative implication the failure to mention spouses is deemed intentional.

Although the court's reliance on these two factors may be questionable, it is apparently justifiable in view of the court's chief concern: "To allow a common law recovery for loss of consortium merely because such is not expressly mentioned in the body of the . . . Act, would make the liability of the employer uncertain and indeterminate."[43] As part of the *quid pro quo* for

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ployee's Compensation Act); Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960) (Louisiana law); Heacker v. Southwestern Bell Tel. Co., 270 F.2d 505 (5th Cir. 1959) (Texas law); Thomas v. Central Linen Co., 263 F.2d 495 (D.C. Cir. 1959) (Longshoremen's and Harbor Workers' Compensation Act).

35. *E.g.*, GA. CODE ANN. § 114-414(a) and (b) (1973).

36. *E.g.*, Arthur v. Arthur, 156 Ind. App. 405, 296 N.E.2d 912 (1973).

37. *See* Bloemer v. Square D Co., 8 Ill. App. 3d 371, 290 N.E.2d 699 (1972).

38. *See* Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968).

39. *See* W. PROSSER, THE LAW OF TORTS § 125 (4th ed. 1971).

40. *E.g.*, Smither and Co. v. Coles, 242 F.2d 220 (D.C. Cir.), *cert. denied,* 354 U.S. 914 (1957); Newman v. Gibraltar Coal Corp., 350 F. Supp. 71 (W.D. Ky.), *aff'd,* 471 F.2d 653 (6th Cir. 1972).

41. See note 33 and accompanying text *supra.*

42. "[E]xpression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (rev. 5th ed. 1979). Thus, when certain persons are specified in a statute, "an intention to exclude all others from its operation may be inferred." Little v. Town of Conway, 171 S.C. 27, 31, 170 S.E. 447, 448 (1933).

43. 270 S.C. at 198-99, 241 S.E.2d at 558 (quoting Stainbrook v. Johnson County

liability without fault under the workmen's compensation system, the employer's liability for accidental injuries arising out of the employment is limited to the payment of compensation.[44] In return, the employee receives a swift and certain remedy uncomplicated by the common law defenses.[45] To allow a separate suit against the employer by an injured employee's spouse would erode one of the goals of workmen's compensation legislation, which is to guarantee the employer that by coming under its provisions he will be held liable for his employee's work-related injuries only to the extent of the workmen's compensation benefits.

B. Carrier's Lien

Under the workmen's compensation system, if the injury to an employee results from the act of a third-party wrongdoer, the employee still may be entitled to receive compensation benefits from his employer. To relieve the employer of some of the burden of paying these benefits, the workmen's compensation laws seek to effect an equitable adjustment of the rights and liabilities of the employee, the employer, and the third-party tortfeasor.[46] This adjustment is accomplished by assigning the injured employee's right of action against the tortfeasor to the employer, or to the employer's insurer.[47] The employer or his insurer, after paying compensation benefits to the employee, can then proceed against the culpable third party and attempt to recoup payments.[48] A problem could arise, however, if the injured employee secretly obtains a settlement with the third-party tortfeasor, and then demands compensation benefits from his employer. On paying these benefits, the employer would be assigned the rights of the employee against the tortfeasor, but because of the secret settlement, the employee would have no rights to assign. Consequently, the employer would be left with no recourse against the

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Farm Bureau, Coop Ass'n, 125 Ind. App. 487, 122 N.E.2d 884 (1954)).

44. 2 A. LARSON, *supra* note 6, § 65.10. *See also* Adams v. Davison-Paxon Co., 230 S.C. 532, 545, 96 S.E.2d 566, 572-73 (1957); Nolan v. Daley, 222 S.C. 407, 416, 73 S.E.2d 449, 451 (1952).

45. 2 A. LARSON, *supra* note 6, § 65.10.

46. *Id.* § 73.22.

47. Fuller v. Southern Elec. Serv. Co., 200 S.C. 246, 252-53, 20 S.E.2d 707, 710 (1942).

48. Stroy v. Millwood Drug Store, Inc., 235 S.C. 52, 109 S.E.2d 706 (1959); Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 57 S.E.2d 308 (1950); Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947).

third-party wrongdoer. To protect the employer from this type of conduct and its consequence, South Carolina's workmen's compensation laws grant the employer's carrier a lien on the settlement proceeds under certain circumstances if the settlement was entered into without consent.[49]

The importance to the employee of involving the employer in his settlement negotiations with the third party was recently emphasized by the South Carolina Supreme Court in *Rogers v. Watkins Motor Lines, Inc.*[50] The employee, Rogers, was receiving compensation benefits for an injury arising out of and in the course of his employment. Rogers subsequently filed a tort action in another state against the responsible third-party tortfeasor and through this suit received a substantial settlement.[51] The employer's insurer sought to have a valid lien placed on the settlement proceeds in the amount of the compensation benefits already paid. In granting this lien, the court cited South Carolina's third-party liability provision,[52] which declares that when the employee and the third party enter into a compromise settlement without the written consent of the employer's insurer, "the settlement shall be invalid as against the carrier, which shall be entitled to maintain an action against the third party to recover the amount of compensation for which the carrier is liable"[53] to the employee. The court accepted the Commission's finding that the employer and his carrier were entitled to reimbursement for the benefits that they had already paid, because the settlement was negotiated without the "knowledge, consent, or approval"[54] of the Industrial Commission.

III. COMPUTATION OF AVERAGE WEEKLY WAGE

In South Carolina, as in most jurisdictions, the amount of payment an injured employee or his dependents can receive under workmen's compensation depends upon the employee's average weekly wages prior to his injury.[55] The method for deter-

49. S.C. CODE ANN. § 42-1-560(b) (1976).

50. 270 S.C. 238, 241 S.E.2d 744 (1978).

51. The employer's insurer had already paid Rogers compensation benefits totaling $1,734.26. The settlement that Rogers subsequently negotiated with the third party was for $6,600. 270 S.C. at 240, 241 S.E.2d at 745.

52. S.C. CODE ANN. § 42-1-560 (1976 & Cum. Supp. 1978).

53. *Id.* § 42-1-560(f) (Cum. Supp. 1978).

54. 270 S.C. at 241, 241 S.E.2d at 745.

55. *See* S. HOROVITZ, *supra* note 1, at 262-67.

mining the average weekly wage is defined by statute.[56] Generally, if the injured employee had worked for an entire year immediately before the accident, then his average weekly wage is his salary for that one-year period divided by fifty-two.[57] On the other hand, if the injured employee had not worked for a full year prior to his accident, then his average weekly wage is determined by dividing the salary that he received during the periods that he was employed by the number of weeks that he worked.[58] Both of these methods are subject to the general qualification that the result reached must be "fair and just" to both the employee and the employer.[59]

In *Bennett v. Gary Smith Builders*,[60] the claimant, Bennett, worked as a carpenter for nearly eighteen years in the employment of Smith Builders. On reaching age sixty-two he quit working full time and began drawing Social Security. From his "retirement" until the time he received his injury, a period of nine years, Bennett worked each year for Smith Builders until he had earned the maximum amount he was allowed to make without penalty and continued to receive full Social Security benefits. This amounted to working three or four months a year and earning about $2,500 each year. Bennett received a compensable injury while he was so employed. The issue presented to the supreme court concerned the amount of benefits to which he was entitled.

Because Bennett worked less than fifty-two weeks a year, the Industrial Commission determined his average weekly wage by

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56. S.C. CODE ANN. § 42-1-40 (Cum. Supp. 1978).

57. *Id.* Section 42-1-40, in relevant part, defines the term "average weekly wages" as follows:

> "Average weekly wages" shall mean earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceeding the date of the injury, . . . divided by fifty-two . . . . When the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, *provided results fair and just to both parties will be thereby obtained. . . .*
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> *But when for exceptional reasons the foregoing would be unfair,* either to the employer or employee, *such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*

Id. (emphasis added).

58. *Id.*

59. *Id.*

60. 271 S.C. 94, 245 S.E.2d 129 (1978).

dividing the earnings during the period of employment by the number of weeks worked. Using this method, the Commission determined that Bennett was entitled to workmen's compensation benefits that amounted to an annual payment that was almost twice as much as he had actually earned during any one of the nine years since he had gone into semi-retirement.[61]

The supreme court held that, under these circumstances, this method of computing the average weekly wage was erroneous. When the injured employee has worked for a period of less than a full year immediately prior to his injury, the average weekly wage may be determined by dividing the earnings received by the total number of weeks actually worked only if the result reached is one that is "fair and just" to both of the parties.[62] Otherwise, the average weekly wage must be computed by a method that "will most nearly approximate the amount which the injured employee would be earning were it not for the injury."[63]

The court found that it would be "grossly unfair" to Smith Builders to require it to pay Bennett nearly twice the amount that he would have earned had no injury occurred.[64] It, therefore, decided that Bennett was entitled to workmen's compensation benefits based on an average weekly wage that would be computed by utilizing the $2,500 amount that Bennett would have received annually had he not been injured. In so doing, the court noted:

> The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings. The calculation we hereby approve brings about a result fair to the employee and to the employer. It neither rewards the employee for working less than full time, nor punishes the employer for having given [the employee]

61. The Commission by dividing "the earnings during the period of employment by the number of weeks worked . . . found Bennett's average weekly wage to be $151.48, thereby making the compensable rate $91.17. At $151.48 per week, he would have earned $7,876.96 in a full year of employment. Workmen's Compensation benefits at $91.17 per week would amount to $4,740.84 per year . . . ." *Id.* at 97-98, 245 S.E.2d at 131. Compare this with the $2,500 that he would actually have earned each year if he had not been injured.

62. S.C. CODE ANN. § 42-1-40 (Cum. Supp. 1978).

63. *Id.*

64. 271 S.C. at 98, 245 S.E.2d at 131.

part-time employment after he declined full-time employment.[65]

The court was careful to emphasize that the employee had *voluntarily* withdrawn himself from his employment for the balance of the year, the normal average weekly wage calculation period. The court stated:

> [W]e have an employee who for reasons satisfactory to himself, while fully capable of working, quit and withdrew his services from the labor market except for three or four months in the year. Disability has caused him to lose approximately $2,500.00 per year. Failure to receive any amount over and above that figure in the past or future is not attributable to the injury he sustained, but rather is attributable to the pattern of work activity he has voluntarily assumed.[66]

Thus, when the employee is only working part time at the time of his injury, and when the reason for working part time stems from the employee's voluntary choice, based on reasons of his own to withdraw himself from the labor market, then the average weekly wage computation should reflect as nearly as possible the amount that he would have earned had it not been for the injury. But when the employee, at the time of his injury, is temporarily working part time, not because of his desire to do so, but because his employer, reacting to adverse economic factors, has directed him to do so, then it would not be fair to tie the employee down to his reduced annual income; rather, the average weekly wage should be computed by dividing the earnings received during the period of actual employment by the number of weeks worked.[67]

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65. *Id.* at 98-99, 245 S.E.2d at 131-32.

66. *Id.* at 98, 245 S.E.2d at 131.

67. This has been suggested by one authority, using a partial week to illustrate:

> Where, because of a depression, shortage of material or other reason, the employee is working only three days weekly, at $5 per day, whereas ordinarily he worked six days and earned $30 weekly, many states take his actual earnings ($15 weekly), whereas others consider the normal week, or $30 weekly. The difference to the worker is enormous. In one state he would receive $10 (two-thirds of $15) weekly, in the other, $20. If the depression continued, he was better off not to work in the $20 state, but if work picked up and his co-workers began earning more than $30 weekly, the unfortunate injured worker still continued to draw only $10 in the narrower states.
>
> Neither method is always just, yet the more equitable solution is to use the higher wage schedule rather than the depressed wage, and guard carefully against malingering.

S. HOROVITZ, *supra* note 1, at 263-65 (footnotes omitted).

This approach is in accord with the workmen's compensation program's objectives to provide substantial protection against interruption of income,[68] and to compensate not only for the actual loss of wages but also for loss to the wage-earning capacity.[69]

Additionally, it is clear in *Bennett* that the employee, if he had not been injured, would have continued his pattern of maintaining only a part-time connection with the labor market.[70] The significance of this factor becomes apparent from the following example. Suppose that a young man, while finishing his last year of school, is working only on weekends and suffers a compensable injury that results in total permanent disability. To compensate him for a lifetime on the basis of his part-time weekend earnings would clearly not reflect the actual impairment of his future earning capacity.[71] Accordingly, it has been held that in such situations the compensation should be calculated as if the young man were working full time, reflecting as nearly as possible the probable actual impairment to his wage-earning capacity.[72]

Thus, in light of *Bennett* and general workmen's compensation law, a step-by-step approach can be utilized in ascertaining the average weekly wage of an injured employee. The bottom line test is that the result reached must be fair and just to both the employee and the employer. This result is obtained only when the compensation awarded approximates, as nearly as possible, the employee's probable future earning capacity. When the employee, at the time of his injury, has been working only part time his average weekly wage may be determined by either of two methods: (1) the earnings that he received over the year immediately prior to the accident may be divided by fifty-two, with a relatively low average weekly wage as a result; or, (2) the earnings that he received over the year immediately preceeding his accident may be divided by the number of weeks that he actually worked, with a relatively high average weekly wage as a result. Which method should be used in turn depends on two factors: (1) whether the injured employee was working part time voluntarily;

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68. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 18-19, 35, 36-38 (1972).

69. *Id.* at 137.

70. Mr. Bennett was over seventy-years old at the time of his accident and drawing Social Security benefits. 271 S.C. at 96, 245 S.E.2d at 130.

71. *See* 2 A. LARSON, *supra* note 6, §§ 60.20-.22.

72. *See* Perrin v. Tanner Grocery Co., 46 So. 2d 886 (Fla. 1950); Ferch v. Great Atlantic & Pacific Tea Co., 208 Minn. 9, 292 N.W. 424 (1940).

and (2) whether there is reason to expect that the pattern of part-time employment will continue indefinitely into the future. The part-time work pattern is involuntary when the employee is forced into it, whether because of general adverse economic conditions,[73] a temporary sickness or disability,[74] or the simple refusal of employers to hire him full time.[75] Only if the part-time work pattern was voluntarily assumed and likely to continue into the future should the lower average weekly wage method be used. If either one of the above factors is not present, then, absent special circumstances, the higher average weekly wage computation method should be employed.

IV. ESTOPPEL TO ASSERT THE STATUTE OF LIMITATIONS

If death is the result of a work-related injury that falls within the scope of workmen's compensation coverage, then it is necessary that the claim for benefits be filed with the Industrial Commission within one year from the date of the accident or else the right to compensation shall be forever barred.[76] In *Robertson v. Brissey's Garage, Inc.*[77] the South Carolina Supreme Court held that the workmen's compensation carrier was estopped to assert the statute of limitations against the claimant, when the carrier's conduct unintentionally misled the claimant, and when the claimant's failure to timely file her claim was a reasonable result of the carrier's conduct, even though such conduct was purely gratuitous.

Mr. Brissey suffered a fatal injury while working at his garage and a compensation claim was brought by his widow. The insurance carrier argued that because Mr. Brissey had been president and part owner of the garage, he was not an employee under the Workmen's Compensation Act[78] and his death therefore was not compensable. The carrier informed the widow, Mrs. Brissey, of its position, and in reliance on this, she failed to file a timely claim.

In holding that this conduct estopped the carrier from asserting the statute of limitations against the claimant, the court ad-

73. *See* 2 A. LARSON, *supra* note 6, § 60.21.
74. *See* Krogman v. Krogman Filter Co., 89 N.J. Super. 16, 213 A.2d 256 (1965).
75. *See* 2 A. LARSON, *supra* note 6, § 60.21.
76. S.C. CODE ANN. § 42-15-40 (Cum. Supp. 1978).
77. 270 S.C. 58, 240 S.E.2d 810 (1978).
78. *Id.* at 61, 240 S.E.2d at 810.

dressed itself to two subissues, both of which it answered affirmatively: (1) did the carrier by its conduct mislead the claimant; and, (2) was the reliance by the claimant on the acts or representations of the carrier reasonable or justified? The question requires that a causal connection exist between the carrier's conduct and the failure of the claimant to file a timely claim. It was immaterial that the carrier acted in good faith, without an intent to mislead, so long as its conduct actually had that effect.[79] Neither did it make any difference that the carrier was under no obligation to act but rather was rendering a gratuitous service.[80]

The first subissue requires that there be actual reliance; the second one requires that this reliance be justified. Of extreme importance in answering both questions is the relative disparity of the knowledge and experience between the claimant and the carrier with respect to the Workmen's Compensation Act. When the carrier occupies a position far superior to the claimant, it would normally be reasonable for the claimant to consider it futile to assert a claim for workmen's compensation benefits in view of the positive assertions by the carrier that the injury or death is not compensable.[81]

In light of this case, a workmen's compensation insurance carrier would be well advised to use care in informing a potential claimant that the injury suffered by the employee is not compensable. Indeed, it is difficult, under the court's reasoning, to imagine a case in which the claimant, unless he is a sophisticated businessman, would not be justified in relying upon the carrier's position that the injury falls outside the scope of compensation coverage. In order to avoid being estopped from asserting the statutory limitation should the claimant later file an untimely claim, the cautious carrier, in addition to informing the claimant of its position, would be well advised to also: (1) explain to the claimant that the carrier's opinion is nothing more than an opinion and is not binding on the Insurance Commission; (2) explain to the claimant that it is the Insurance Commission that makes the decision whether or not an injury is compensable, and not the carrier; (3) explain to the claimant that he and the carrier are in adverse positions, that is, that any compensation found owing

79. *Id.* at 64, 240 S.E.2d at 812. Young v. Sonoco Prod. Co., 210 S.C. 146, 156, 41 S.E.2d 860, 864 (1947).

80. 270 S.C. at 64, 240 S.E.2d at 812.

81. *Id.*

will have to come from the carrier's pocket; and, (4) briefly outline to the claimant the preliminary procedures for filing his claim, emphasizing any time limitations. Moreover, it is essential that this be done in good faith. If the above factors are explained to the claimant, he may still rely on the carrier's opinion and fail to file a timely claim, but it is extremely doubtful that his reliance would be justified, for no longer would an imbalance in knowledge exist between the parties concerning the Act and its coverage.

V. 1978 LEGISLATIVE AMENDMENTS

A. Recovery Ceiling Removed. In many instances in the past, the $40,000 ceiling meant that compensation was not the choice method of recovery since many cases could possibly result in larger awards at the hands of a jury.[82] Effective May 19, 1978, this drawback to a claimant's recovery was alleviated by the elimination of the $40,000 maximum permissible recovery.[83]

> [A]n employee can now collect 66 and 2/3 percent of his average weekly wage for 500 weeks, without regard to a limitation or a cap, other than as set by the Employment Security Commission the preceding year. In substance, a total disability claim is now worth in excess of $80,000.00, assuming the individual's average weekly wage is high enough to obtain the maximum.[84]

B. Carrier's Lien In Third-Party Actions. When an injured employee has received workmen's compensation benefits from his employer's carrier and subsequently, in a separate suit, recovers damages from a third party, the carrier is entitled to a lien against these proceeds to the extent of benefits already paid.[85] By amendment this year, a provision has been added that calls for a proportionate reduction in the amount of a carrier's lien in this type of third-party action when the employee did not receive adequate total damages in the third-party action.[86]

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82. S.C. CODE ANN. § 42-9-100 (1976).
83. *Id.* § 42-9-100 (Cum. Supp. 1978).
84. SOUTH CAROLINA TRIAL LAWYERS ASSOCIATION, THE BULLETIN 9 (Nov./Dec. 1978).
85. S.C. CODE ANN. § 42-1-560 (1976).
86. *Id.* § 42-1-560(f) (Cum. Supp. 1978), which provides in part:

> Notwithstanding other provisions of this item, where an employee or his representative enters into a settlement with or obtains a judgment upon trial from a third party in an amount less than the amount of the employee's esti-

C. Filing Claim For Occupational Disease. The filing of a workmen's compensation claim must be made within two years from the date of the accident or else the right to compensation is barred.[87] With the normal work-related accident this requirement causes little problem, since the date of the accident can be easily determined and the injured employee is immediately and painfully aware of his injury. Occupational diseases, however, pose a problem because there is no definable "date of the accident." Because no "accident," in the ordinary meaning of the word, occurs, the injured employee may not be aware of his "injury" until a considerable period of time has elapsed since he contracted it. Recognizing this, the South Carolina Code of Laws now provides that in the case of an occupational disease the two-year statutory period does not begin to run on the date of the accident as with other injuries. Instead, the limitations period begins to run only after the occupational disease has been definitely diagnosed and the affected employee has been notified.[88]

D. Hearing Attendance. New amendments have given the Industrial Commission some bite to its bark. Failure to comply with the terms of the Commission's subpoena or disorderly conduct at a hearing may now subject the offender to the Commission's power to cite and punish for contempt. Moreover, a refusal to attend a hearing, testify or produce records has been characterized as a misdemeanor, punishable by a fine or imprisonment up to thirty days.[89]

H. Fred Kuhn, Jr.

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mated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of such settlement in the proportion that such settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law. Any such reduction shall be based on a determination by the commission that such reduction would be equitable to all parties concerned and serve the interests of justice.

87. *Id.* § 42-15-40 (Cum. Supp. 1978).

88. *Id.* This section states in relevant part: "[I]n the case of occupational disease claims such two-year period shall not begin to run until the employee concerned has been definitively diagnosed as having an occupational disease and has been notified of such diagnosis." *Id.*

89. *Id.* § 42-3-150 (Cum. Supp. 1978).